

United States  
Circuit Court of Appeals  
For the Ninth Circuit 7

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THE APACHE LAND AND CATTLE COMPANY,  
a corporation,  
Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,  
a corporation, et al.,  
Appellees.

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APPELLEE'S BRIEF

FILED

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UPON APPEAL FROM THE DISTRICT COURT  
OF THE UNITED STATES FOR THE DIS-  
TRICT OF ARIZONA

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## INDEX

	Page
Appellant's First Argument.....	4
Appellant's Second Argument.....	8
Argument .....	2
Discussion of Appellant's Argument.....	4
Statement of Pleadings and Facts Disclosing Jurisdiction .....	1

## INDEX TO CASES CITED

Adams-Booth Co. vs. Reid (C. C. D. Nev.) 112 Fed. 106 .....	4
Aetna Life Insurance Co. vs. Lyon County, 44 Fed. 329 .....	11
Baltimore S. S. Co. vs. Phillips, 274 U. S. 316, 320; 47 Sup. Ct. 600, 602.....	7
Chicot County Drainage Dist. vs. Baxter State Bank, 308 U. S. 371, 378; 60 Sup. Ct. 317, 320 .....	7
Citizens State Bank vs. McRoberts, 29 Ariz. 173, 177; 239 Pac. 1028, 1029.....	7
✓ Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah, 44 Ariz. 427; 38 Pac. (2d) 626 .....	4, 7, 11
Edmundson vs. Independent School Dist., 98 Iowa 639; 67 N. W. 671.....	11

## INDEX TO CASES CITED, Continued

Grand Island and N. W. R. Co. vs. Baker, 6 Wyo. 369; 45 Pac. 494.....	11
Gray vs. Roberts, 12 Am. Dec. 383.....	4
Hall vs. Coppel, 7 Wall. (74 U. S.) 542, 558; 19 Law Ed. 244.....	10
Howard vs. Huron, 5 S. Dak. 539, 59 N. W. 833...	11
Kendall vs. Silver King Mining Co., 26 Ariz. 456; 226 Pac. 540.....	3
Lake County vs. Platt, 79 Fed. 567.....	11
Louisville & N. R. Co. vs. Railroad Commission, 205 Fed. 800.....	4, 5, 6
National Union Indemnity Company vs. Bruce Bros. Inc., 44 Ariz. 454; 38 Pac. (2d) 648...3, 6, 8	
Pick Mfg. Co. vs. General Motors Corporation, (C. C. A. 7) 80 Fed. (2d) 639, 641.....	7
Reorganized Catlin Consol. Canal Co. vs. Hinder- lider, 80 Colo. 522; 253 Pac. 389.....	4
✓ Scott vs. Bruce Bros., Inc., 44 Ariz. 469, 471; 38 Pac. (2d) 654, 655.....	3, 8, 10
Webster vs. Lowell, 2 Allen (Mass.) 123.....	11
34 C. J. 856, Note 52.....	3
34 C. J. 860.....	4

In the United States  
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APPELLEE'S BRIEF

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION

The statement appearing on pages 2 and 3 of Appellant's Opening Brief is correct and Appellee, for brevity, makes reference thereto.

## ARGUMENT

For brevity Appellant will hereinafter be referred to as "Cattle Company" and Appellee as "Insurance Company".

The case before the Court reduces itself to a rather simple question. In August 1940, Insurance Company obtained a judgment (T. R. 16-23) foreclosing a mortgage executed by Cattle Company July 1, 1930 (T. R. 17) covering the same lands (T. R. 21) involved in the present action (T. R. 3). Cattle Company appeared in the foreclosure action and confessed judgment (T. R. 18). The lands were sold under special execution (T. R. 29-32) and in due time Sheriff's Deed to Insurance Company was issued (T. R. 37-43) covering these lands.

Cattle Company now seeks by this independent action to quiet title to the same lands in it, alleging (T. R. 12-13) that the Insurance Company was at the time of receiving the mortgage and at all times subsequent, until after the issuance of Sheriff's Deed, a foreign corporation not qualified in Arizona and at all of said times engaged in an enterprise of permanence and durability in the State and transacting within the State a substantial part of its ordinary business. From this the conclusion is drawn (T. R. 13) that the mortgage and all subsequent proceedings were totally void. Insurance Company took the position below in which it was sustained by the District Court by granting a summary judgment (T. R. 46)

that the issues presented in this collateral action were res judicata by virtue of the judgment (T. R. 16-23) in the foreclosure action.

1. Had Cattle Company presented and sustained the issue here raised as to nonqualification and doing business by the Insurance Company in the foreclosure proceeding judgment could not have been rendered therein for Insurance Company.

*National Union Indemnity Company vs. Bruce Bros., Inc.*, 44 Ariz. 454; 38 Pac. (2d) 648.

2. This would have been true even though the issue were not pleaded but appeared from the evidence before the Court.

*Scott vs. Bruce Bros., Inc.*, 44 Ariz. 469, 471; 38 Pac. (2d) 654, 655.

3. The issue as to Insurance Company doing business while not qualified was a defense which could have been raised in the foreclosure action to show the invalidity of the mortgage and defeat the right of Insurance Company to maintain that action. The judgment in favor of Insurance Company in the foreclosure action therefore bars the Cattle Company from maintaining any subsequent action attacking the foreclosure on that or any other ground which could have been raised as a defense in the foreclosure action.

34 C. J. 856, Note 52.

*Kendall vs. Silver King Mining Co.*, 26 Ariz. 456; 226 Pac. 540.



*Adams-Booth Co. vs. Reid* (C. C. D. Nev.) 112  
Fed. 106.

4. This rule is applicable even though the defense now sought to be relitigated is that the transaction was illegal or contrary to public policy.

34 C. J. 860.

*Gray vs. Roberts*, 12 Am. Dec. 383.

*Reorganized Catlin Consol. Canal Co. vs. Hinderlider*, 80 Colo. 522; 253 Pac. 389.

*Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah*, 44 Ariz. 427; 38 Pac. (2d) 626.

## DISCUSSION OF APPELLANT'S ARGUMENT

The Cattle Company seeks to avoid the effect of the rules set forth above by two lines of argument. *First*, that the judgment in foreclosure expressed the issues determined upon which relief was granted and that therefore only such issues are *res judicata*. *Second*, that the issue of nonqualification while doing business is an issue which may be raised at any time in any action without regard to prior adjudication.

### *Appellant's First Argument*

The first point depends entirely on the case of *Louisville & N. R. Co. v. Railroad Commission*, 205



Fed. 800. Cattle Company's brief (p. 8) quotes from 34 C. J. 859, but examination discloses that the rule as there stated is supported only by the *Louisville & N. R. Co.* case above. In the *Louisville & N. R. Co.* case, in a prior proceeding, a series of acts of the Alabama legislature establishing rates on intrastate business had been held unconstitutional as confiscatory and the Railroad Commission had been enjoined from enforcing the acts. Subsequently it directed the railroad to put into effect a passenger rate of 2½¢ a mile, which was one of the rates included in the series of acts. The railroad thereupon asked for a rule directed to the Railroad Commission to show cause why it was not in contempt in ordering the establishment of a passenger rate. The Court held that the prior decree did not actually determine that the passenger rate was unreasonable, but simply that the schedule of rates as a whole was confiscatory. The Court could have reached this decision whether the passenger rate alone was or was not confiscatory, and therefore the Court not having expressly passed upon it the issue was not foreclosed by the doctrine of res judicata. In other words, the Court in the prior decision could have decided that the passenger rates were either reasonable or unreasonable and still have decided that the entire schedule of rates, as a whole, was confiscatory. Therefore, the decision which it did render that the entire schedule was confiscatory did not necessarily include a decision either way as to the passenger rates alone.

In the present case Cattle Company contends that

the findings in the judgment on the issues (T. R. 19) do not mention the issue of nonqualification and doing business, and that therefore that issue is not *res judicata*. An examination of the three findings shows that the Court decided *first*, that the allegations of the complaint and supplemental complaint were true, *second*, that the defendant (Cattle Company) was indebted to the plaintiff (Insurance Company) in the sum of two hundred twenty-five thousand dollars (\$225,000.00), and that the plaintiff (Insurance Company) was entitled to have judgment entered for said amount, and, *third*, that the plaintiff (Insurance Company) was entitled to a decree directing the sale of the mortgaged lands and the application of the proceeds to its debt. We submit that these findings are not findings on the issues upon which judgment was rendered such as are referred to in the *Louisville & N. R. Co. case, supra*, but are at best statements or findings found in all so-called general judgments.

Even though they were to be considered as findings on issues within the meaning of the *Louisville & N. R. Co. case, supra*, still unlike that case a decision in the foreclosure case in favor of Cattle Company's present position as to doing business and nonqualification would have prevented the court from making the "findings" it actually made, and in addition from entering the judgment which it did enter.

*National Union Indemnity Company vs. Bruce Bros. Inc., supra.*

Therefore the foreclosure judgment is *res judicata*

on the point of doing business while not qualified against the contention of the Cattle Company.

*Baltimore S. S. Co. vs. Phillips*, 274 U. S. 316, 320; 47 Sup. Ct. 600, 602;

*Citizens State Bank vs. McRoberts*, 29 Ariz. 173, 177; 239 Pac. 1028, 1029;

*Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah (Ariz.)*, *supra*.

Nor is it material that the issue was neither considered nor raised in the foreclosure case.

*Chicot County Drainage Dist. vs. Baxter State Bank*, 308 U. S. 371, 378; 60 Sup. Ct. 317, 320;

*Pick Mfg. Co. vs. General Motors Corporation* (C. C. A. 7) 80 Fed. (2d) 639, 641; and cases cited therein;

*Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah*, *supra*, states the rule as follows:

“Neither does the fact that the question of usury was not made an issue necessarily have this effect, since nothing can be litigated in a subsequent action between the same parties that was a proper subject of inquiry in the first but not considered merely because the defendant who was

personally served failed to answer and raise it. 'It is well settled,' to use the language of this court in *Citizens' State Bank v. McRoberts*, 29 Ariz. 173, 239 P. 1028, 1029, 'that all matters in issue, *or which could have been put in issue*, in the action to collect the note were conclusively settled by the judgment in that cause. \* \* \*' Appellant claims that this statement of the law is too broad but it is supported both by reason and authority and we see no occasion to modify it." (Emphasis ours.)

### *Appellant's Second Argument*

Cattle Company's second argument (T. R. 9) is that the issue of nonqualification while doing business may be raised at any time in any action without regard to prior adjudication. Basically the entire argument on this point depends upon the two decisions of the Arizona Supreme Court in the cases of *National Union Indemnity Co. vs. Bruce Bros., Inc.*, 44 Ariz. 454; 38 Pac. (2d) 648 and *Scott vs. Bruce Bros., Inc.*, 44 Ariz. 469; 38 Pac. (2d) 654. The two cases arise out of the same basic facts. Bruce Bros., a foreign corporation not qualified in Arizona, entered into a contract to do highway work in the State and in pursuance of this work made a subcontract with Scott by which he was to deliver gravel on the work. Scott defaulted on the contract and Bruce Bros. brought action against him and against the surety for damages for default in performance. The surety company pleaded nonqualification of Bruce Bros. as a defense.

Scott's original pleading did not set up this point, but at the trial he asked leave to amend to raise it. This was granted by the Court upon condition as to payment of Scott's costs, which Scott refused to meet, and the plea therefore was not in Scott's pleading. Upon the trial the surety company introduced evidence to establish the doing of business by Bruce Bros. and its nonqualification. The lower court ruled that the surety company had not sustained the burden on this point and proceeded to an adjudication on the main cause of action. From a judgment against the defendants the surety company and Scott prosecuted separate appeals resulting in the two decisions above-mentioned. On the surety company's appeal it was contended that as Scott had not raised the defense of nonqualification the surety could not do so, and that therefore in effect the defense was waived. The Court held in the surety company's appeal that the defense could not be waived in any action by the other party, and on Scott's appeal the Court held it immaterial that the pleadings did not raise the point because the evidence had actually appeared in the case below and the defense being one not waivable when the evidence did appear in the court below the court should proceed as though the evidence were properly before it under the pleadings. The Court's holding is simply stated on page 471 of the Arizona Report, page 655 of the Pacific Report, as follows:

"We think that under the circumstances whenever it appeared to the trial court in the pleadings and the evidence that the contract upon which



plaintiff sought to enforce a liability against either or both of the defendants was void *ab initio*, that it makes no difference in whose pleadings or through whose evidence that fact became known. It was the duty of the trial court upon such knowledge reaching it to hold immediately that no liability could be predicated as against any defendant upon the void contract."

The cases involve no question of *res judicata* and simply hold that the defense of illegality when not pleaded but when shown by the evidence is to be considered by the court nonetheless. The basis of the Court's decision is found in its quotation from *Hall vs. Coppel*, 7 Wall. (74 U. S.) 542, 558, 19 Law Ed. 244 that "The defense is allowed, not for the sake of the defendant, but of the law itself \* \* \* Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." Neither the case of *Scott vs. Bruce Bros., Inc.* nor the cases cited therein upon which it relies involved a question of prior adjudication. The only reason for making a distinction between the issue here raised by the Cattle Company and any other defense which could conceivably have been offered in the foreclosure case is that this issue involves illegality and public policy. However, when the defense of illegality is raised in a case involving prior adjudication it is clear that the Arizona Supreme Court makes no distinction and holds that a defense of illegality may be barred by prior adjudication in the same manner as any other defense.

*Collister vs. Inter-State Fidelity Building and  
Loan Association of Utah (Ariz.) supra.*

We have found no cases involving the doctrine of res judicata as applied to the statute upon which Cattle Company here bases its claim. However, there are cases which are squarely on all fours in the principle and which clearly negative plaintiff's (Cattle Company's) contention in this case. These cases relate to the enforcement of judgments obtained against municipalities for the payment of bonds or other evidences of indebtedness to which the municipalities attempted to assert a defense based upon a constitutional limitation. It will be found that the courts generally hold that such a defense was not available because it was not asserted in the original suit upon the bonds. Of this character are the following cases:

*Aetna Life Insurance Co. vs. Lyon County*, 44  
Fed. 329.

*Lake County vs. Platt*, 79 Fed. 567.

*Howard vs. Huron*, 5 S. Dak. 539; 59 N. W.  
833.

*Webster vs. Lowell*, 2 Allen (Mass.) 123.

*Grand Island and N. W. R. Co. vs. Baker*, 6  
Wyo. 369; 45 Pac. 494.

*Edmundson vs. Independent School Dist.*, 98  
Iowa 639; 67 N. W. 671.



Basically Cattle Company's entire case rests upon the extension of the language used in the *Bruce Bros. cases, supra*, to cover a case not there presented, that of a prior adjudication, and it should be noted logically that if the language is to be so considered it would be applicable whether in the prior case the issue had not been raised but was necessarily involved, or had been raised and decided against the contention of the proponent of the issue. In other words, Cattle Company's position is that the issue of nonqualification while doing business can never become res judicata.

We respectfully submit that the Cattle Company cannot in this collateral proceeding attack the judgment in the foreclosure proceedings upon any of the grounds urged by the Cattle Company. The judgment below should be affirmed.

Respectfully submitted,

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